IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FAMILY COURT APPEAL NO.77 OF 2001
WITH
FAMILY COURT APPEAL NO.78 OF 2001

Kailas Laxman Bhalerao,
Age 37 years, Occ.Service,
R/o Nityanand Nagar, Link
Road, Khalail House,
Ghatkopar (West),
Mumbai-400 086. ... Appellant
(Org.Petitioner)

Vs.

Sou. Jyoti Kailas Bhalerao,
Age 34 years, Occ. Household,
R/o Kisan Ramchandra Bhagwat,
S/No. 46/6,Plot No.3,
Ramkunj, Adwaitnagar, Erandavane,
Pune-411 038 ..Respondent.
(Org.Respondent)

Mrs. Suhasini Mutalik for the appellant.
Mr. Sushil Nimbkar for the respondent.

CORAM : F.I. REBELLO &
ANOOP V.MOHTA, JJ.

DATE : 24TH AUGUST, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

. The Appellant-husband has filed these two appeals, challenging the common Judgment and Order dated 30th June, 2001, passed by the Family Court, Pune in Petition A No.129 of 1999, (by the appellant) under section 13(i)(ib) of the Hindu Marriage Act, 1955 (for short H.M. Act) and Petition C. No.50 of 1998 (by the respondent-wife) under Section 18 and 20 of the Hindu

Adoption and Maintenance Act, 1956 (for short Hindu Maintenance Act), whereby, rejectded appellant's case of divorce and grantred an order of maintenance, in favour of respondent, and a minor son.

2. First appeal No.77/2001 is against the order of rejection of divorce under H.M.Act, filed by the appellant-husband. Appeal No.78/2001 is filed by appellant-husband against the order in of grant of maintenance at the rate of Rs.1000/- per month to the wife and Rs. 1500/- per month to the son, Sushant, under Section 18 and Section 20 of the Hindu Maintenance Act, respectively.

3. On 6/12/1985, appellant and respondent got married at Pune. They resided at Mumbai for some time. One son, Sushant, was born out of the said wedlock. The son was taking education in Mumbai. They lived together till November, 1995. However, as alleged, lateron their relations were not good and strained. Appellant therefore, on 9/9/1997, had filed a Marriage Petition No. 88/1996, on the ground of cruelty and desertion, before the Family Court, Pune. The said petition was resisted by the respondent. After hearing both the

parties, the said Petition A-40. No.88/1996 was dismissed.

4. The respondent, thereafter, has preferred P.C.No. 50/1998, on 15/5/1998, for maintenance for herself and her son, under Section 18 and 20 of the Hindu Maintenance Act. The appellant resisted the said petition by his written statement.

5. The appellant, however, again on 22/2/1999, has filed divorce petition No.129/1999, on the ground of desertion under section 13(i)(ib) of the H.M. Act. As noted earlier the earlier petition filed by the appellant based on cruelty and desertion, had been dismissed. The case of the appellant is that respondent had deserted him since 29/11/1995 and in spite of the notice dated 4/12/1995, asking her to cohabit, she failed and refused to cohabit and therefore, appellant was compelled to file the present petition for dissolution of the marriage on the ground of desertion. The respondent by her Written Statement again resisted the same. The learned Judge, heard both the petitions together. The Parties also led common evidence. The Parties have examined themselves only. No evidence of

any other witnesses was lead.

. Pending the above petitions, by interim order, dated 10/5/2000, the learned Family Court Judge had awarded the maintenance in favour of the respondent and her son, in a lump sum amount of Rs. 1500/- from the date of the application i.e. 20th March, 2000.

6. The Family Court in Petition No. 129/1999, filed by the appellant-husband, held that the petitioner husband failed to prove, that the respondent wife deserted him and further a continuous period of more than two years had elapsed before presentation of this petition and consequently rejected his divorce petition. It is also held that there is a bar under Section 23 of the Hindu Marriage Act for passing such divorce decree.

7. In Respondent’s case, in P.C. No.50/1988, the learned Family Court Judge, held that the respondent wife has proved that the appellant husband deserted her. It is also held that the appellant husband willfully neglected his wife and his son. Therefore, after considering the income of the appellant, awarded the maintenance at the rate of Rs. 1000/- per month to the

respondent under Section 18 and Rs. 1500/- per month to their son under Section 20 of the Hindu Maintenance Act. Therefore, the appellant has preferred these two separate appeals against the common order in question.

. The points for determination in these appeals are:-

(i) Whether the appellant is entitled for divorce as prayed?

(ii) Whether respondent-wife and minor son are entitled for the maintenance as prayed?

(iii) Whether impugned common order passed by the Family Court, Pune needs interference by this appellant Court?

8. The undisputed position in these appeals is the rejection of Petition NO.88/1996 filed by the appellant against the respondent wife on the ground of cruelty and desertion. The same was dismissed on merit, as appellant failed to prove the grounds of cruelty and other elements of desertion, as contemplated under section 13(i)(ib) of H.M. Act. There are substantially

no changed circumstances and or evidence or material, placed on the record to justify the Second and or present divorce petition filed by the appellant. There is no dispute that the parties are residing separately since 29/11/1995. The respondent wife has filed P.C. No. 50/1998 on 5th May, 1998. The appellant husband has filed P.A.No.. 129/1999 on 9/2/1999. There is no further dispute that the parties are residing separately and continuously for more than two years.

. The basic proof and settled elements of "Doctrine of desertion" under Section 13(i)(ib) are (i) Factum deserendi (the fact of Separation), and (ii) animus deserendi, (the intention to desert), (iii) absence of consent and wish (iv) absence of reasonable cause to either of the spouse, leaving the matrimonial home, (v) to bring cohabitation permanently to an end or an intention to make cohabitation impossible or (vi) or willful neglect and (vii) desertion for a contineous peirod of not less than two years immediately proceding the petition. The facts and circumstances of each case are the foundation for such elements of doctrine of desertion. It may be actual desertion or constructive desertion.

9. First and foremost and that is undisputed that on identical facts and grounds of cruelty and desertion, earlier petition was dismissed. On the same facts, appellant, according to us, is not entitled for a decree of divorce on the ground of desertion. The evidence of the appellant, as answered in cross-examination, which are relevant, are reproduced as under:-

> " I had written letter to respondent's father in November, 1995. I had requested respondent's father to take her back with him. I had sent the letter on 23/11/1995. As written in my letter dt. November, 1995 respondent's father came to Bombay and took her with him on 29.11.1995. the marriage petition NO.88 of 1996 was filed by me on the ground of desertion and cruelty against the respondent I had pleaded in that petition respondent has deserted me since 29/11/1995 and the cause of action arose on 29/11/1995".
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> I sent notice to the respondent on 4/12/1995 demanding divorce. The present petition is filed by me on the ground of desertion. It is stated by me that respondent left me in November, 1995 and the cause of action for this petition arose on November, 1995. In the marriage petition NO. 88 of 1996 previously filed by me, there were two grounds desertion and mental cruelty. I had decided to divorce the respondent and after considering all the facts I had given the notice on 4/12/1995. I am still firm on my decision I am 12th pass. Respondent is M.A. My father has retired. It is true that I had alleged that respondent gets lunatics attacks. One of the reason behind giving notice on 4/12/1995 that respondent was getting lunatic attacks".

. The learned Family Court therefore, after considering the basic evidence as produced above, rightly rejected the case of the appellant of the divorce. This evidence further prove that the appellant himself wanted respondent wife to leave his house and accordingly, he had called her father from Pune Mumbai to sent her back. Thereafter, to sent the notice, further shows that he wanted to end the relationship permanently. Respondent/wife had replied to the said notice and also expressed her readiness to resume cohabitation provided he resides in Pune. She was not ready to resume for cohabitation at Mumbai. The appellant was responsible for compelling respondent-wife to leave the house and created the circumstances, which compelled her to leave matrimonial home, Therefore, such appellant, cannot be entitled or claim benefits of his own wrong, on the foundation that respondent wife left the house and or deserted, her for more than two years. The elements of doctrine of desertion quoted earlier in no way, support the appellant. It is appellant, whose intention was never to cohabit with respondent-wife. Respondent-wife in her evidence deposed that she was ready and willing to cohabit with the appellant.

10. The appellant wants divorce only and therefore, even on earlier occasion he had applied for divorce, on the ground of cruelty and desertion. Once the sam or disbelieved and appellant's case for divorce was dismissed, on the same facts and circumstances, the appellant cannot claim decree of divorce on the ground of desertion as prayed in the present petition.

11. The appellant further failed to prove that there was animus deserendi existed, when respondent wife left his house. Respondent wife did not leave the house of the husband voluntarily. On the contrary record shows that the appellant deserted her without any reasonable cause. Respondent wife deposed as under;

> "The petitioner did not take me back for cohabitation nor he came to Pune to meet me but he filed petition for divorce in the Court. In that petition, I showed my willingness to joint the petitioner for cohabitation. Now I am ready to resume cohabitation with the petition provided he resides in Pune. I am not ready to join him for cohabitation at Mumbai. At present I am residing with my parents. My son is with me. The petitioner has not provided any maintenance to me but he is depositing maintenance amount for son Sushant as per order of the Court in P.C. No.50 of 1998. I am not employed nor I am doing any business. I have no source of earning. At present my father is maintaining me".

> "From 1987 till first petition was filed I was not working in Bombay. Myself and petitioner shifted to Pune in September 1988. I resided in Pune till May 1995. From 1988 to 1995 myself and my son were residing in Pune. The petitioner used to come to Pune on every Saturday and Sunday".
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> "My son suffered from pneumonia and as per doctor's advice we started residing at Pune. I and my son were going to Bombay frequently, I used to visit Bombay whenever I was called by my fahter-in-law".
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> " I was ready to cohabit with the petitioner after the divorce petition was dismissed. I have not filed any petition of restitution of conjugal rights since 1995 till today".

. The above deposition according to us is sufficient to maintain the reasoned order passed by the Family trial Judge by refusing to grant divorce to appellant.

. The trial Court therefore, rightly held on the facts and circumstances of the case that there is legal bar under Section 23 of H.M. Act for grant of decree of divorce to the appellant.

12. The grant oflumpsum ad interim maintenance of Rs. 1500/- after considering the material placed on

record, has been modified by the impugned order whereby, the amount of Rs. 1500/- has been awarded in favour of son and Rs. 1000/- per month towards, maintenance for the respondent. Considering the material, as well as, evidence on the record, the fact which cannot be over looked is that the appellant is also maintaining his old parents who are residing with him. Considering the fact that appellant is residing at Mumbai and respondent with her son is residing at Pune, we are of the view that the amount of maintenance as awarded in favour of son at the rate of Rs. 1500/- required to be reduced to Rs. 1000/-. In the result the respondent and her son are entitled to get Rs. 2000/- per month as maintenance from the appellant i.e. Rs. 1000/- each under Section 18 r/w Section 20 of the H. M. Act as referred above. One more aspect is that respondent is residing with her father in Pune. She has brought all her personal belongings with her at Pune. She admit that she was working with Mehta Publication before 1st May 1995. However, she has now denied that she is not employed with Mehta Publication. She further deposed that she had no income. She also denied the suggestion that she did not need maintenance from the petitioner. Considering the income of the appellant including its

actual receipts of Rs. 5,123, we are of the view that maintenance amount of Rs.. 1000/- each to the respondent and her son would be sufficient in the facts and circumstances of the case. Balance of Rs. 3123, should remain with the respondent husband for himself and his parents. The appellant's parents are dependent on him as his father is also retired, as observed by the Court. This is also an additional reason to reduce the amount of the maintenance.

13. In view of above, we see that there is no case made out by the appellant husband to interfere with the order of grant of dismissal of divorce petition as prayed. The order according to us of rejection of divorce petition is within the frame work of law and material on the record and need no interference. However, so far as the order of maintenance is concerned, in view of reasonings as recorded above, according to us the respondent is entitled for the Rs. 1000/- towards maintenance for herself and Rs. 1000/- towards her son i.e. total Rs. 2000/- per month from the date of order i.e. 13/6/2001 as awarded by the Court. Therefore, the impugned order is modified to this extent only. Rest of the common Judgment and order

is maintained.

14. In view of this, the Family Court Appeal No. 77/2001 against refusal of divorce is dismissed and Family Court Appeal No. 78/2001 against grant of maintenance is modified to the extent as referred above i.e. respondent is entitled for maintenance at the rate of Rs. 1000/- per month from the date of award i.e. 13/6/2001, Son Sushant is entitled for the maintenance at the rate of Rs. 1000/- per month also from the date of order i.e. 13/6/2001.

. No order as to costs.

. Parties concerned to act on a simple copy of this order, duly authenticated by the Court Stenographer of this Court.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]